IN THE SUPREME COURT OF NEW ZEALAND **SC 82/2022**
I TE KŌTI MANA NUI O AOTEAROA

BETWEEN	**CLOUD OCEAN WATER LIMITED**
	Appellant
AND	**AOTEAROA WATER ACTION INCORPORATED**
	First Respondent
AND	**CANTERBURY REGIONAL COUNCIL**
	Second Respondent
AND	**SOUTHRIDGE HOLDINGS LIMITED**
	Third Respondent
AND	**NGĀI TŪĀHURIRI RŪNANGA**
	Intervener

SYNOPSIS OF LEGAL SUBMISSIONS FOR THE APPELLANT

22 February 2023

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MAY IT PLEASE THE COURT

Introduction

1. Cloud Ocean Water Limited (**Appellant**), has been granted leave to appeal against a Court of Appeal Decision (**CoA Decision**)[1].

2. The CoA Decision reversed the High Court's decision[2]. The CoA found Canterbury Regional Council[3] (**Council**) did not have authority to grant resource consents CRC180728, CRC180729[4] and CRC182812[5] – each authoring the use of specified water for commercial water bottling purposes (**Use Permits**) - separately to an authorisation to also take the water to be used for that purpose. Consequently, the CoA Decision found the Use Permits unlawful and quashed them.

3. The approved question before the Court is whether the CoA was correct to allow the First Respondent's Appeal.

Summary of Argument

Court of Appeal Decision

4. The Court of Appeal decided two issues:

    a. Whether the Council could lawfully consider and grant a stand-alone "use" consent; and

    b. Whether the bottling of water is a "use" of water within the meaning of s14 of the Resource Management Act 1991 (**Act**).

Can a stand-alone use consent be granted?

5. The parties and lower Courts have been consistent in identifying this as the key issue for determination. Cloud Ocean's case is:

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[1] *Aotearoa Water Action Inc v Canterbury Regional Council* [2022] NZCA 325, (2022) 24 ELRNZ 30 [[101.0193]].
[2] *Aotearoa Water Action Inc v Canterbury Regional Council* [2020] NZHC 1625, (2020) 21 ELRNZ 911 [[101.0111]].
[3] Often referred to as Environment Canterbury or ECan.
[4] The holder of both CRC180728 and CRC180729 being Rapaki Natural Resources Limited [[301.0057]] – [[301.0058]].
[5] The holder of CRC182812 being Cloud Ocean Water Limited [[301.0163]].

a. The Resource Management Act 1991 (**Act**) recognises and provides for the authorisation of "water takes" and "water use" as separate activities. This is consistent with:

   i. The outcome of an orthodox statutory interpretation exercise; and

   ii. Case law touching upon the issue.

b. There no evident intention in the Land and Water Regional Plan (**LWRP**) to step away from the ability to address "take" and "use" activities, either separately or together, as the circumstances require;

c. This can be contrasted to other parts of the LWRP where such an intent is evident, in relation to consent transfers;

d. In addition, there is Objective and Policy scaffolding within the LWRP which supports an intention to deal with "use" applications separately, where appropriate, to allow the evolution of water use and advance the wellbeing of the communities the LWRP serves;

e. Rules 5.128 and 5.6 are equally important rules. The fact Rule 5.6 is a "catch-all" rule does not diminish its role in implementation of the Plan and achievement of its aspirations. Catch-all rules are common in planning instruments prepared under the Act and are both lawful and designed to apply to activities that do not otherwise neatly fit within the ambit of other rules;

f. An activity that falls to be assessed under Rule 5.6 attracts the status of fully discretionary. This is a higher/harder status than that afforded by Rule 5.128 and it allows all and any adverse effects of the subject activity to be considered. In comparison, Rule 5.128 only allows consideration of the effects over which discretion has been expressly reserved;

g. The fully discretionary status alleviates any concerns about relevant effects being beyond the reach of the consenting process. This includes matters such as the reasonableness of volumes proposed for the activity;

h. In addition, s91 of the Act is competent to ensure Rule 5.6 is not inappropriately used – for example, to avoid prohibited status for stand-alone takes in over-allocated zones;

i. Rules exist in plans to implement the objectives and policies that precede them. They do not dictate the content of higher-order provisions nor make decisions on their behalf. Resource consents authorise activities, not breaches of rules. Rules are compared to resource consent applications to identify whether and what type of consent is required; applications are not crafted to conform to the ambit of rules;

j. If a rule covers the activity proposed, it has to be applied. Equally, if a rule does not encompass the activity, there is no need to wrestle the activity into its purview. This is particularly so in respect of s11 to 15 uses, because, at worst, the activity will end up being considered under s87B of the Act as a discretionary (fully) activity;

k. The consent process adopted by the Council for the water bottling consents was unremarkable in that the application of Rule 5.6 to the use-only applications was both orthodox and long-established[6] for situations like this;

l. As well as not being unusual, the process adopted by the Council was not designed to avoid prohibited status because:

    i. In the circumstances of these proceedings, the Appellant did not require a "take" consent because it already had one. All its proposal required was a consent enabling it to use the taken water for bottling purposes; and

    ii. Where there are existing, implemented resource consents affecting the environment of the proposal the Council must:

[6] Environment Canterbury Regional Council, Technical Advice Note: *Implications of Court of Appeal Decision in AWA v CRC [2022] and next steps for Consents*, dated 19 August 2022, at page 1 [[201.0086]].

1. Assume they are being exercised to the full extent of their permission; and

2. Assess the environment as it is or would be with those consents being exercised.

iii. A simultaneous surrender and grant of take would bring the application within the ambit of Rule 5.128 anyway, attracting either restricted discretionary or non-complying status.

iv. The Christchurch West-Melton Groundwater Allocation Zone does not have a hard or definite allocation limit. This is in sharp contrast to all other Groundwater Allocation Zones in the LWRP.

Is commercial water bottling a "use" of water?

6. Like the High Court before it, the CoA found water bottling is a use of water for the purposes of s14(2) of the Act. The Appellant supports this finding because:

a. Like irrigation, water for bottling has to be piped from its point of take to its destination, where it is then "released" for use. The application of irrigation water to land constitutes a "use", notwithstanding the intermediary incidence of conveyance. There is no principled reason as to why the bottling of water would be any different;

b. A bottle is not a tank, pipe or cistern as those words are commonly defined and understood. This means when the water leaves the conveyance system and enters a bottle, it is being used;

c. It is artificial to consider water bottling a "purpose" of taking but not a "use" of taken water. The considerations are the same;

d. If this Court reverses this aspect of the CoA decision, it does not materially advance matters for AWA or the Rūnanga because a stand-alone "take" consent would be needed so Rule 5.6 would need to be engaged or possibly s87B(1)(a) of the Act. Alternatively, if the application is shoe-horned into Rule 5.128, the arguments at 5.l.iii and 5.l.iv above, are equally applicable here.

Notice that Judgment Will Be Supported on Other Grounds (**AWA's Notice**)[7]

Ground 1 – is water bottling a "use" of water

7. The first additional ground raised by AWA's Notice relates to whether the proposed bottling activity is a use of water for the purposes of s14. This issue was addressed by the CoA. AWA challenges the CoA's findings. The Appellant's position is summarised at paragraph 6 above.

8. Additional Grounds (2) and (3) were considered in the High Court but not the CoA.[8] These grounds are more in the nature of "classic" Judicial Review grounds in respect of non-notification decisions under the Act.

Ground (2) – effects arising from the disposal of plastic bottles

9. Ground (2) relates to the environmental effects arising from the plastic bottles in which water is placed. In response, the Appellant says any environmental effects arising from the end use of plastic bottles are not *effects of the activity* because:

   a. They are too remote to be considered in the course of the applications;

   b. It would be difficult (if not impossible) to ascertain whether and to what extent disposal of the plastic bottles associated with these bottling activities would lead to an effect that has a tangible impact on the environment; and

   c. Therefore, Council was correct to omit consideration of any such effects.

Ground (3) – cultural values and tikanga

10. Ground (3) relates to effects on cultural values and tikanga. This complaint was not part of AWA's Statement of Claim. From the outset the Appellant submits it would be inequitable for relief to be granted on the basis of this claim, given both its absence from the initiating proceedings and the time that elapsed before Rūnanga joined the High Court proceedings. The Appellant

[7] Dated 13 December 2022 [[05.0019]].
[8] Above n 1, at [134] [[101.0234]].

also notes the Intervener was not given leave to appear at the High Court hearing and was confined to tabling legal submissions and an affidavit.

11. In any event the Appellant says:

    a. Whether there would be adverse effects on cultural values and tikanga was considered by the Council in reaching its decisions on both notification and grant of the consents;

    b. The Council's assessment included comparing the existing and proposed takes in terms of their consumptive nature and concluding both were fully consumptive;

    c. Despite the applications proceeding non-notified, the Council directly informed the Intervener (by email) of the existence of the consent applications and sought comment on same;

    d. Ironically, Rule 5.6 allowed Council to consider cultural values whereas Rule 5.128 (the "take and use" rule) is Restricted Discretionary only and (at the time) did not allow for cultural values to be considered; and

    e. Changes of water use by way of application and assessment under Rule 5.6 are fully discretionary activities. This activity status affords opportunity for Rūnanga to participate in such applications and decision-makers are unbridled as to the effects they can consider.

Factual Narrative

12. The appellant (**Cloud Ocean**) purchased land at Belfast, Christchurch in 2017. The site had historically been used for a wool scour activity. To undertake that activity, a resource consent[9] (**Original Consent**) was held to take and use groundwater[10]. The Original Consent was transferred to Cloud Ocean around May 2017[11].

[9] CRC971084 [[301.0083]].
[10] From the Christchurch West-Melton Groundwater Allocation Zone, which is regulated under the Canterbury Land and Water Regional Plan [[305.0016]].
[11] Pursuant to section 136(2)(a) of the Resource Management Act 1991.

13. Later in 2017 Cloud Ocean applied to the Council for a new consent. The application sought to "use" water taken under the Original Consent for water bottling.

14. Cloud Ocean's application included an assessment of environmental effects. Compared to the consented use of water for wool scouring, the application said the changed use would be more efficient and less environmentally burdensome[12].

15. The Council processed the application in the usual way. The relevant Council Officer prepared a Report under s42A of the Act. In the Report, the Officer assessed potential adverse effects to reach a position on notification. Whilst evaluating the application for notification purposes, the Council Officer informed Rūnanga (and others) of the existence of the application and provided opportunity for comment.[13]

16. After considering the issue of notification the s42A Officer went on to assess all actual and potential effects of the proposed use[14]. Ultimately, he recommended the application need not be formally notified[15] and the new "use" consent be granted[16].

17. The Officer's recommendations were then subject to consideration by a delegated decision-maker within Council (Dr Burge) [17]. Dr Burge considered the Officer's Report and also applied independent thought to the matter[18]. Like the Reporting Officer, Dr Burge took account of the existing consent to *take* water and determined the Cloud Ocean application was properly characterised and assessed as *a new water permit to <u>use</u> water*[19].

18. Ultimately, Dr Burge agreed notification was not required and the substantive application ought to be granted[20]. The new use permit shared a common

[12]Above n 1, at [44] - [45] [[101.0206]] – [[101.0207]].
[13] Affidavit of Philip Ian Burge, dated 23 September 2019 [201.0062]].
[14] Above n 1, at [46] - [51] [[101.0207]] – [[101.0208]].
[15] Although the Council did contact several entities (including Rūnanga and Christchurch City Council) and provide them with opportunity to comment.
[16]Above n 1, at [47], [52] - [53] [[101.0207]] – [[101.0209]].
[17] Dr Philip Ian Burge; Dr Burge provided three affidavits in the course of these proceedings dated 16 August 2019 [[201.0037]], 23 September 2019 [[201.0059]] and 5 December 2019 [[201.0064]], respectively.
[18]Above n 1, at [52] to [61] [[101.0208]] to [[101.0211]].
[19]At [56] [[101.0209]].
[20]At [60] - [61] [[101.0210] – [101.0211].

expiry date with the Original Consent and allowed water taken under the Original Consent, to be used for water bottling.

19. The Council granted two similar water use permits, in similar circumstances, to the Third Respondent, Southridge Limited (**Southridge**). The litigation to date has considered all three permits on a fairly equal footing, on the basis they share the same salient facts.

20. After granting each of the three Use Permits, the Council amalgamated them with the existing Take Permits. This created three new Take and Use Permits.

21. AWA challenged the consents by way of judicial review. Two preliminary decisions were issued by the High Court[21] before the substantive hearing was held. At the substantive hearing the High Court traversed the following challenges in detail:

    a. The failure of the Council to treat the applications as being for new take and use consents for water bottling and thus for a prohibited activity in terms of the Regional Plan;

    b. The adoption of an unlawful process through the way the Council amalgamated the consents for the new use with the previously granted take consents;

    c. A failure to make the required effects assessment undertaken at each stage of the decision-making process through only assessing the effects of the takes for the new purpose of water bottling against the effects of the previously granted takes; and

    d. The Council wrongly assessed effects on the environment for the purposes of s 95A(8) or s95A(2)(a) on the basis the previously consented activities and the effects of those activities were to be considered as part of the environment against which the effects of the relevant new activity were to be assessed.

[21] *Aotearoa Water Action Inc v Canterbury Regional Council [2018] NZHC 3240, (2018) 20 ELRNZ 793* [[101.0001]]; and *Aotearoa Water Action Incorporated v Canterbury Regional Council* [2019] NZHC 3187, [2020] 2 NZLR 359 [[101.0094]]. One as to whether the existing Take and Use Consents in fact already authorised water bottling (a question of scope of those consents); and the other as to the Intervener application by the Rūnanga.

22. The High Court found in the Council's favour on all four bases. AWA appealed.

23. The CoA decision only addressed 21.a above because the Court decided Council had been wrong to consider and grant a stand-alone "use" consent, therefore dispensing of the need to decide upon the other challenges. As part of addressing 21.a, it canvassed an argument from AWA that water bottling does not constitute a "use" of water for the purposes of s14. It rejected that argument.

24. These legal submissions therefore address the pivotal issue decided by the CoA and subject of the Appeal, whether a stand-alone "use" consent can be considered and granted by the Council (upon application).

25. In response to AWA's Notice, these legal submissions also address the subsidiary question of whether water bottling is a "use" of water in terms of s14 of the Act.

26. Despite (and without prejudice to) the Appellant's reservations about Ground 3 of AWA's Notice, these legal submissions also address the final two grounds[22] put forward:

    a. The allegation Council wrongly neglected to consider the environmental effects of the disposal of plastic bottles; and

    b. The allegation Council did not assess effects on cultural values and tikanga, arising from the proposed use of water for commercial water bottling.[23]

The vires of a use-only consent

27. To-date the Courts have dealt with this question in two parts:

    a. Whether it is lawful to regulate a "use" separately from a "take" under the Act; and

[22] AWA's Notice identifies three grounds but the first appears to be the same as that set out in 21.b above.
[23] As noted at paragraph 10 above, the Appellant takes issue with the ability of AWA to raise this ground. However, these legal submissions address the matter without prejudice to the Appellant's position of opposition to it.

b. Whether it is lawful to do the same under the LWRP.

Does the Act allow regulation of "take" and "use" separately?

28. Both Courts have reached the view it is lawful, under the Act, for each of the four activities addressed in section 14 to be regulated separately.[24]

29. AWA's Notice does not raise this as an issue for re-consideration and it appears AWA did not resist this finding in the CoA.[25]

30. The High Court undertook detailed analysis of this point at paragraphs [95] to [121]. The following key reasons for its decision can be distilled:

a. The interpretation is supported by ascertaining the meaning of s14 from its text, in light of its purpose and with regard to the context in which the words are used.[26]

b. The interpretation arrived at accords with:

i. S 14(3)(b) where the word "or" is prevalent and used in a disjunctive sense;[27]

ii. S 30(1)(fa) which gives a regional council the function of establishing rules in a plan to allocate the taking or use of water and the taking or use of heat or energy from water;[28] and

iii. S 30(4)(d), which allows a council to allocate a natural resource, such as water, used for a particular activity to be used for another activity, to have rules dealing with the use separate from the take of water.[29]

c. The interpretation arrived at also accords with case law, including the following two decisions:

i. *Central Plains*[30] – where the application to take water was lodged in 2001 and the application to use that water was lodged in 2005

[24] Above n 1, at, at [110] to [112] [[101.0227]].
[25] At [104] [[101.0224]].
[26] Above n 2, at [99] [[101.0134]].
[27] At [100] [[101.0134]].
[28] At [102] [[101.0137]].
[29] At [103] [[101.0137]].
[30] *Central Plains Water Trust v Ngai Tahu Properties Ltd* [2008] NZCA 71.

(after the take application was put on hold under s91 of the Act). The Court of Appeal considered the take application was complete.[31] This is authority for the proposition separate applications can be made for the take or use of water.[32] Whether they should be heard together depends on s91 of the Act; and

ii. *P & E Limited*[33] – where an application for the use of water was withdrawn in the course of the Environment Court hearing:[34]

> During the hearing P & E, through counsel, withdrew the application to "use" water under section 14 RMA. It later acknowledged that in its view – shared by the CRC - a use consent under section 14 is still required (although it did not say what for precisely). It appears that the purpose of withdrawing the "use" application was to withdraw from the hearing any issues about the downstream effects of use of the water for irrigation. Counsel for Forest and Bird was rather critical of the withdrawal for that reason. However, developers prefer to obtain consents incrementally if they can, if only to reduce costs, so we accept P & E's action was reasonable.

d. The Court noted:

i. The Waitaki Catchment Water Allocation Regional Plan allocates amounts of water for different uses; and[35]

ii. The LWRP sometimes deals with taking and use conjunctively[36] and other times, disjunctively[37]. At times, the same provision can deal with it both ways as well[38].

e. The Court considered evidence of past practice and noted that, while not determinative, it was of assistance to the Court of know if the way the Council proceeded with the application was anomalous in terms of Council's own processes[39]. It is submitted the Council's Technical

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[31] At [76] and [80].
[32] Above n 2, at [111]. [101.0139]].
[33] *P & E Ltd V Canterbury Regional Council* [2015] NZEnvC 106.
[34] At [9]; cited by the High Court Above n 2, at [114] [[101.0139]].
[35] Above n 2, at [116] [[101.0140]].
[36] In the High Court at [117], the Court gave the following examples, rs 5.123, 5.124, 5.125, 5.125D(a), 5.126, 5.127, 5.128, 5.129, 5.130, 5.131 and 5.132 [[101.0140]].
[37] For example, objective 3.10 [[304.0077]], 4.4 [[304.0080]], 4.8 [[304.0081]], 4.71 [[304.0102]], 5.121 [[301.0153]], 5.122 [[304.0153]] and 9.5.6 [[305.0006]].
[38] For example, policy 4.71 [[304.0102]] and 5.133 [[304.0159]].
[39]Above n 2, at [120] [[101.0140]].

Advice Note[40] (issued subsequent to the Court of Appeal decision) is useful in demonstrating the same.

f. The interpretation decided upon is consistent with the purpose and principles of the Act. The Court noted the Act was an effects-based statute that seeks to control the effects of activities rather than strictly by name or category. The Court accepted the relevant water had been allocated and that allocation existed for the length of the term of the consents.

Does the LWRP evidence an intention to adopt a different approach to s14?

31. It is open for a Plan to modify the effect of the Act in its particular district or region. To do so reflects the reality of local context and that plans are intended to be an expression of the communities they affect and their priorities.

32. An example of this is Rule 11.5.41[41] of the LWRP. In effect, that Rule prohibits the transfer of water permits in some circumstances. This is despite s136 of the Act bestowing a discretionary status on such applications.

33. It is submitted this shows an awareness, on the part of the LWRP, of both:

a. Its ability to include more nuanced and bespoke rules than the Act might have; and

b. What those rules could look like.

34. It is submitted the LWRP:

a. Could readily have a rule similar to 11.5.41, precluding the ability for people to obtain stand-alone use consents; and

b. Could fairly be expected to have a provision of that kind if that was actually the LWRP's intention.

35. In addition, there are a number of higher-order provisions within the LWRP that speak to the value of allowing people to deal with use permits, so the

[40] Above n 6 [[201.0086]].
[41] [[305.0066]].

community can adapt to changing economic and social circumstances over time.[42]

Rule 5.6 or 5.128?

36. Upon receiving the applications for "use" the Council deliberately and carefully considered how to process them – including choosing between Rules 5.128 and 5.6[43]. The Council decided to process the applications under Rule 5.6 because it considered:

    a. The applications were, as a matter of fact, for "use only" consents; and

    b. Rule 5.128 applied only to activities that involved both a "take" and "use".

37. While the Court of Appeal agreed it is lawful under the Act to have independent "take" and "use" consents, it went on to hold:

> [113] … it does not necessarily follow from the drafting of ss 14 and 30 that the Council is able to grant a separate consent for a use and a separate consent for a take. Whether or not that is possible will in our view depend on the terms of the regional plan and the controls it contains in relation to water. … Where the expression used is "taking and use" the intent appears to be that the activity will involve both.

38. As far as it goes, this paragraph aligns with the Council's process in that Council also took the view Rule 5.128 addresses an activity that involves "taking" and "using" of water. The difference is that Council then considered whether Rule 5.128 applied to the activity proposed and, because the activity did not involve both taking and use, Council decided it did not apply; whereas the Court of Appeal decided the activity was actually a take and use because that is what Rule 5.128 required.

39. The Appellant submits:

    a. It agrees Rule 5.128 applies to activities that involve both a take and use; but

[42] Objectives 3.5 [[304.0077]], 3.10, 3.11 [[304.0077]] and Policy 4.67 [[304.0101]] of the LWRP.
[43] Affidavit of Philip Ian Burge, dated 16 August 2019, at [41] [201.0045]].

b. The proposed activity does not involve both and therefore cannot be subject to Rule 5.128; and

c. What is proposed by an applicant is a matter of fact. A rule either applies or it does not. A rule has the force and effect of regulation. It should be clear and unambiguous. Its application should be readily and objectively ascertainable.

Relevant effects under Rule 5.6 and 5.128

40. Rule 5.6 is fully discretionary meaning all effects of the activity can be considered. In contrast, an application under Rule 5.128 is Restricted Discretionary and, at the time the applications were processed, effects on cultural values and tikanga were not matters a decision-maker could lawfully have regard to.

41. Rule 5.6 was and is a higher hurdle to surmount because the range of considerations is unfettered. This includes matters such as reasonableness of the use and whether conditions of consent need to be imposed to ensure this. This is part of the answer to the CoA's concerns, particularly at [118].

42. The other part of the answer is that an assessment of effects needs to consider the *environment* upon which effects are to be imposed. It is lawful for the Council to consider implemented consents as part of the existing environment – in fact, it is necessary[44]. In addition, the consent authority must assume full use of the right[45] and refrain from overly speculative arguments that cannot be positively addressed (especially as consent themselves are permissive)[46].

43. There are sound policy and practical reasons why existing resource consents need to be assumed to be utilised to their maximum extent – including that any other approach risks underestimating the cumulative effects of a proposal.

44. The CoA expressed concern that *the consented volumes of take are a given* because *of separating out the take and use components of the activity*. With respect, it is submitted that is less a consequence of engaging Rule 5.6 and

[44] *Colley v Auckland Council* [2021] NZHC 2365, at [89].
[45] *Smith v Marlborough District Council* NZEnvC W098/06, at [12].
[46] *Bay of Plenty Regional Council v Fonterra Co-Operative Group Limited* [2011] NZEnvC 73, (2011) 16 ELRNZ 338, at [49].

more a consequence of there being an existing, implemented consent to take the amount of water relied upon for the use applications. The s42A Reports noted both the existing use and the proposed use were fully consumptive[47].

Role of rules in a plan

45. With respect, the CoA's findings effectively see Rule 5.128 determining what kind of activity is being applied for – which is to give rules a function and role inconsistent with the Act and case law.

46. The Act provides that rules are there to implement higher-order provisions. They serve the policies and objectives they relate to. Rules do not set aspirations or make decisions.

47. Case law relating to the formulation of planning instruments has observed rules do not drive policies or objectives – to do so would be a case of the tail wagging the dog[48]. It is submitted the Court of Appeal's decision leads to a similar outcome in respect of applications - it lets the rule decide what the proposal is, rather than the application itself.

Catch-all Rules

48. Rule 5.6 is a "catch-all" rule. Such rules are common-place in planning instruments and fulfil a useful role by[49]:

    a. Recognising there will be instances when an activity does not fit into any specific rule, through chance rather than deliberate drafting; and

    b. Ensuring activities that should be subject to evaluation do not escape scrutiny by sheer good luck.

49. The Act expressly contemplates rules within plans that *may require a resource consent to be obtained for an activity causing, or likely to cause, adverse*

[47] S42A Reports for Rapaki Natural Resources Limited, prepared by Matt Smith, dated 31 July 2017, at page 2 [[301.0034]] and [[301.0045]]. S42A Report for Cloud Ocean Water Limited, prepared by Carlo Botha, dated 21 December 2017, at pages 3 and 4 [[301.0131]] – [[301.0132]].
[48] *Tussock Rise Limited v Queenstown Lakes District Council* [2019] NZEnvC 111, at [44].
[49] *Infinity Group Holdings v Canterbury Regional Council* [2017] NZEnvC 35, at [57].

effects not covered by the plan.[50] In addition, the Act has an equivalent provision.[51]

50. Catch-all rules, such as Rule 5.6, are as legitimate as any other rule in a plan[52].

Resource consents authorise activities, not breaches of rules

51. A proposal is a matter of fact – what is proposed, is proposed. Once defined in the form of a submitted application, it is for the consent authority to evaluate what rules are engaged by the application. An application is compared to the rules but it is not re-written by them. If there are no rules that capture what it is proposed, but it is an activity within sections 11 to 14, it will fall to be considered under s87(B) of the Act.

52. A person obtains resource consent to undertake an activity[53], not to breach a rule.[54]

Does engagement of Rule 5.6 circumvent prohibited activity status?

Take-only applications

53. The CoA expressed concern Rule 5.6 could be exploited in a manner contrary to the intentions of the Plan. - *If it could do that* [consider a stand-alone application] *in respect of a use consent, why not a take consent*[55]*?*

54. The answer is s91. How the s91 process can work is illustrated by the *Central Plains* scenario where the application to "take" was put on hold (for approximately 4 years) pending receipt of applications to "use" the water taken.

55. Section 91 seeks to ensure a holistic and integrated approach to consenting under the Act. In almost all conceivable situations the "take" of water is a precursor activity – it is done for a reason. A council will likely require that "reason" to also be subject of a consent application. If the reason is a "use"

[50] Sections 68(5)(e) and 76(4)(e) of the Act.
[51] Section 87B(1)(a) of the Act.
[52] *Laidlaw College Inc v Auckland Council* [2011] NZEnvC 248, at [82].
[53] *Marlborough District Council v Zindia Ltd* [2019] NZHC 2765, (2019) ELRNZ 364, at [34] and [36].
[54] At [35].
[55] Above n 1, at [130] [[101.0232]].

(which will be the usual course), the Council will then have a take and use proposal before it and Rule 5.6 will become irrelevant.

56. By contrast, a use is a postliminary activity. In almost all cases it follows a take. As such, the take will either have to be sought as well (thereby engaging Rule 5.128) or already consented, as it was here.

Prohibited status of the water bottling applications

57. AWA has argued that if Rule 5.128 were applied to each of the water bottling applications, the applications would be "prohibited" in status and unable to be sought, let alone granted.

58. AWA has sought to achieve this outcome in two ways:

    a. By arguing the water bottling activities proposed are not a "use" in terms of s14 of the Act and therefore can only be authorised via a "take for the purpose of water bottling" consent; or

    b. By arguing it is unlawful for the Council to issue use-only consents because the LWRP requires Council to regulate the "take and use" of water together.

59. The Appellant submits even if AWA were successful:

    a. A take-only consent would also fall outside the ambit of Rule 5.128 and therefore follow the same Rule 5.6 path as AWA resists for the use-only applications. Therefore, success on this ground for AWA would look materially the same as the situation complained of; or

    b. If applications for "take and use" were required under Rule 5.128, prohibited status is very unlikely because:

        i. The Christchurch West-Melton Groundwater Allocation Zone (**GAZ**) is fully (not over) allocated. It is possible to obtain new consents provided there is no increase in the amount of water allocated.[56] This is easily achieved by an applicant concurrently

[56] Provision 9.6.2 of the LWRP [[305.0016]].

surrendering their existing allocation and seeking that it be re-granted in the new consent; and/or

ii. Prohibited status (pursuant to Rule 5.128) only arises if an applicant proposes to exceed a relevant allocation limit. Here, the allocation limit is not a number but rather a statement of general practice:

> In general, no additional water is to be allocated from the Christchurch West-Melton Groundwater Allocation Zone shown on the Planning Maps except for group or community water supply as set out in Rule 5.115 or for non-consumptive taking and use as set out in Rules 5.131 and 5.132.The Christchurch West-Melton GAZ is the only GAZ in the LWRP without a numeric allocation limit[57].

60. It is submitted the "limit" reads like a policy and does not completely preclude an application for further allocation being granted – generally, such an application would not be, but that is not the same as an activity status that stops a person from even applying. If the words "In general" were not part of the clause it would be a firm limit. Those words change the effect of the clause.

61. If there is no limit there can be no infringement of Rule 5.128 (3). Similarly, a groundwater take could not fall foul of condition (2). Condition (1) is satisfied in respect of these particular activities. If Condition (4) is satisfied then Restricted Discretionary status applies. If not, non-complying status applies.

Is water bottling a use of water?

62. Ground 1 of the Notice that Judgment Will be Supported on Other Grounds challenges the CoA's decision the water bottling applications entail a use of water covered by the prohibition in s14(2) of the RMA (unless 14(3) applies).

63. This issue was addressed in detail in both the High Court and CoA. The High Court noted Ms Steven suggested the use of water for commercial bottling

[57] Affidavit of Neil Malcolm Thomas, affirmed on 22 February 2023.

was not a "use" in the sense referred to in s14 or other sections of the RMA. She suggested it was the purpose of the take.[58] The High Court considered this interpretation at odds with the terms of the original consents and also with the judgment of the High Court (Churchman J) on the preliminary issue. There, that Court accepted (in respect of the Rapaki consents) the water take was for industrial use and water bottling would be a "take for industrial use".

64. The High Court referred to the *P & E Limited* decision[59] where the Environment Court, without deciding, considered that the use in s14 is confined to the use in the river. The High Court rejected this suggestion. [60]

65. Ultimately the High Court concluded the immediate and direct use of water was to be for commercial bottling. That was not a remote or indirect application of the water in a way that might justify the bottling of the water to be treated as the purpose of the take rather than the use of water that was being taken. The Court held the use of water for commercial bottling is a use of water in terms of s14 so it could be the subject of consent application to change the use.[61]

66. The Court of Appeal has again dealt with this issue carefully.[62] It concluded that when water leaves the pipe and enters the bottle, that amounts to a use of water covered by the prohibition in s14(2) of the RMA, unless s14(3) applies.[63]

67. Water is defined in s2 of the RMA as:

> **water**—
>
> (a) means water in all its physical forms whether flowing or not and whether over or under the ground:
>
> (b) includes fresh water, coastal water, and geothermal water:
>
> (c) does not include water in any form while in any pipe, tank, or cistern

[58] Above n 2, at [122] [[101.0141]].
[59] *P & E Ltd v Canterbury Regional Council* [2015] NZEnvC 106, at [26].
[60] Above n 2, at [128] [[101.0142]].
[61] At [131] [[101.0143]].
[62] Above n 1, at [86] – [97] [[101.0218]] –[[101.0222]].
[63] Above n 1, at [97] [[101.0222]].

68. The Court of Appeal noted the definition of water is broadly and inclusively defined. Paragraph (a), extends to water in all its physical forms, whether "flowing or not" and whether "over or under the ground".

69. Paragraph (c) of the definition excludes water "while in any pipe, tank, or cistern". The Court of Appeal considered the natural and ordinary meaning of that provision as being that for the period in which the water is in a pipe (or tank or cistern), it is no longer water. But once it is no longer water in the pipe (or tank or cistern), it is no longer excluded.

70. The exclusion in essence creates something of a legal fiction in that water is not water as defined while (Counsel's emphasis) in any pipe, tank or cistern.

71. The fiction created by the definition of water seems to be for the purposes of ensuring that infrastructure for the conveyance of water is not inadvertently captured by s14.

72. The Appellant respectfully concurs a plastic bottle is not a tank or a cistern. As was found by the Court of Appeal, it would be a strained use of language to describe water placed in a bottle as having been placed in a tank or a cistern.[64]

73. It is submitted this is no different than irrigation. The application of water pursuant to an irrigation consent is a use and the bottling of water is a use of water.

74. The Court of Appeal discussed the ordinary meaning of use[65]:

> We do not think it matters in this case that the water is placed in a container once it leaves the pipe, and so will not have a direct effect on the environment once that happens. While many uses of water result in a discharge into the environment, discharges are dealt with under s15(1) of the Act; it is not possible to limit the ordinary meaning of "use" on the basis that the water is used for the purpose of bottling and not discharged.

75. It is respectfully submitted the Court of Appeal was correct.

[64] Above n 1, at [95] [[101.0222]].
[65] Above n 1, at [96] [[101.0222]].

Effects of the End Use of Water Bottling

76. AWA's Notice of Support raises the issue of whether the effects of the end use of plastic bottles (including their export) were relevant and should have been accounted for by the Council in its notification decisions[66]. The litigation on this issue to date is as follows:

a. In the High Court, Nation J held that the adverse effects of the end use of plastic bottles are too remote, and therefore outside the scope of what can be considered on a consent application[67].

b. The Court of Appeal did not re-revaluate this issue[68].

77. It is submitted the High Court was correct in finding the adverse effects of bottling are too remote to be considered any further in this case. Relevantly, the High Court's finding on the matter is supported by the recent Court of Appeal decision *Te Rūnanga o Ngāti Awa v Bay of Plenty Regional Council*[69]. This decision was released after the decision under appeal in these proceedings. It found the end use effects of water bottling were too remote to consider, for the following reasons[70]:

a. permission is not needed under the Act to dispose of plastic bottles. It is inconceivable that the Act can be properly applied to require the consideration of the disposal of plastic bottles in every product sold in a plastic bottle or other plastic container.

b. a consent holder cannot control the actions of a consumer. To elaborate further, the disposal of plastic water bottles are not caused by the action of the resource consent holder, but of persons who have purchased and will consume the bottled water.

c. the disposal of plastic bottles into the environment in New Zealand would be an unlawful and a breach of the Litter Act 1979. This

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[66] Notice by Aotearoa Water Action Incorporated that Judgement will be Supported on Other Grounds, at [2](a) - (c) [[05.0020]] – [[05.0021]].
[67] Above n 2, at [252] [[101.0168]].
[68] Above n 1, at [132] - [134] [[101.0233]] – [[101.0234]].
[69] *Te Rūnanga o Ngāti Awa v Bay of Plenty Regional Council* [2022] NZCA 598.
[70] At [56] - [61].

supports the proposition that the disposal of plastic bottles is not to be regulated under the Act.

d. the disposal of plastic bottles in foreign jurisdictions, whether lawful or unlawful, is too remote to be considered by a consent authority acting under the Act in New Zealand.

e. even if the adverse effects of exporting bottles could be accounted for, it would be impossible to quantify its effects, or assess the impact of lawful and unlawful disposal of plastic bottles in foreign jurisdictions. Similarly, a condition attempting to control the disposal of plastic overseas could not be justified as fairly and reasonably related to a consent to take water[71].

78. The Court in *Ngāti Awa* proceeded to consider the findings in the Supreme Court *Buller Coal*[72] case. In *Buller Coal*, the Court held it would be difficult, and probably impossible, to show that the burning of the coal would have any perceptible effect on climate change. The Court in *Ngāti Awa* went onto state[73]:

> By parity of reasoning with Buller Coal, the widespread and worldwide use of plastic means that any attempt to control its use in the setting of an individual application for resource consent needs to be justified by evidence tending to establish that there would be a tangible impact of doing so. That impact cannot be inferred in its absence.…This is a further reason for affirming the reasoning of the Courts below.

79. It is respectfully submitted the Council was correct in its approach when it determined any adverse effects associated with the end use of bottled water, were irrelevant.

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[71] The consent required in the *Ngāti Awa* case was a take-only. Substantively, the considerations were the same on this point.
[72] *West Coast ENT Inc v Buller Coal Ltd* [2013] NZSC 87, [2014] 1 NZLR 32, at [121]-[127].
[73] *Te Rūnanga o Ngāti Awa v Bay of Plenty Regional Council* [2022] NZCA 598, at [64].

Cultural Effects of the Water Bottling

80. AWA's Notice also seeks to re-visit whether the cultural values and tikanga arising from the water bottling activity including the export of bottles, were relevant and should have been accounted for by the Council prior to determining whether to notify the application for consent.[74] Te Ngāi Tūāhuriri Rūnanga (**Intervener**) was also granted intervener status,[75] to assist the Court with understanding how Rūnanga's cultural values may be affected by the change of use of water for bottling purposes.

81. The issue of whether the Regional Council was correct in its approach when considering the cultural effects of the change in use of water for bottling purposes has been considered at length by Nation J in the High Court decision. Overall, Nation J in the High Court found that there was nothing unlawful or unreasonable in the Council's consideration of the cultural effects of the proposed activity from a Tangata Whenua perspective in reaching its decisions[76]. In the Court of Appeal, it was considered unnecessary to re-evaluate the ultimate decision made by Nation J in the High Court[77] on this issue.

82. In the context of a judicial review, the process of the Regional Council's decision-making is challenged, not the merits of the Regional Council's decision itself[78]. In this regard, it is submitted Council's approach to cultural values and effects on tikanga was lawful, including because:

    a. Council sought comment as to cultural effects for the applications;

    b. The s42A Reports[79] each recognised the "change" proposed involved an existing, fully-consumptive use and a proposed, fully-consumptive use;

[74] Above n 66, at [3](a) - (b) [[05.0021]].
[75] Court Minute dated 13 February 2023, granting Te Ngāi Tūāhuriri Rūnanga Incorporated application seeking leave to intervene.
[76] Above n 2, at [292] [[101.0178]].
[77] Above n 1, at [132] - [134] [[101.0233]] – [[101.0234]].
[78] *Ennor v Auckland City Council* [2018] NZHC 2598, at [30]-[31].
[79] S42A Reports for Rapaki Natural Resources Limited, prepared by Matt Smith, dated 31 July 2017, at pages 2 [[301.0034]] and [[301.0045]]. S42A Report for Cloud Ocean Water Limited, prepared by Carlo Botha, dated 21 December 2017, at pages 3 and 4 [[301.0131]] – [[301.0132]].

c. An analysis of the Cloud Ocean application in terms of the IMP was carried out; and

d. The s42A Reports reflected each officer having given consideration to the effects of concern to Rūnanga.

83. With respect, it is submitted Nation J was correct in his analysis and determination that the Council followed the correct processes when it reached its view that the new use applications would not have an adverse effect on cultural values.

84. There was significant delay in Rūnanga raising concerns about the applications and then joining the proceedings. From the evidence:

a. That Rūnanga was sent two separate emails by the Council to Rūnanga's address for service,[80] advising Rūnanga of the new "use" applications and that they fell within silent file areas. In these emails the Council sought comments from Rūnanga on the proposals. It is important to bear in mind that if the applications were processed under rule 5.128, instead of rule 5.6 of the CLWRP, cultural concerns would have been precluded from the list of permissible considerations.

b. Despite being notified of the applications, no response was received by the Council from Rūnanga. No clear explanation (no bounce back email was received) has been given throughout the proceedings by Rūnanga as to why the email was discontinued and could not be relied on by the Council as Rūnanga's address for service.[81]

c. Having not received any response from Rūnanga, the Council proceeded with assessing the applications and granted the new "use" consents.

[80] Email from ECan to Ngāi Tūāhuriri Rūnanga seeking comments on the Rapaki applications by 26 July 2017 [[301.0032]], and email from ECan to Ngāi Tūāhuriri Rūnanga seeking comments on COW's the application by 11 December 2017 [[301.0121]].
[81] Above n 2, at [275] [[101.0173]].

d. AWA filed its statement of claim on 07 March 2019 initiating the Judicial Review proceedings. Rūnanga did not file their application for leave to intervene until 9 September 2019.

85. The significant delay that occurred before the Intervener raising its concerns is important, and it runs against any argument that relief should be granted to Rūnanga. This conclusion is supported by the High Court decision, where Nation J held:[82]

> …Had there been an error in this regard, that would not have been grounds for the Court to review the Council's decision given Ngāi Tūāhuriri Rūnanga was not a party to these proceedings and had significantly delayed seeking to be heard in them.

86. It is also noted that Mr Tau at paragraph 31 of his new affidavit states that where activities occur within Silent File Areas, consultation with Rūnanga is particularly important in order to identify the affects of an activity. In this case it is clear the Council did attempt to consult with Rūnanga on the applications.

87. The Council took the correct approach when it decided to further process the consent after no response was received by Rūnanga, especially when bearing in mind that the Council was constrained by the obligation in s 95 RMA to decide whether to give public or limited notification within 20 working days after the applications for new use consents were lodged.[83]

88. The High Court identified the key issue before it and held *the key issue before it in the proceedings will thus not directly or indirectly affect the claimed rights of the Rūnanga.*[84] That *key issue* is the same as the one before this Court – whether it is lawful for the Council to grant separate "use" permits.

89. From the documents filed it is submitted the Court in this appeal is confronted with a similar submissions and evidence as to why the Rūnanga wishes to be

[82] At [303] [[101.0180]].
[83] At [279] [[101.0174]].
[84] *Aotearoa Water Action Incorporated v Canterbury Regional Council* [2019] NZHC 3187, [2020] 2 NZLR 359, at [35] [[101.0102]].

involved and what it wants to present.[85] In respect of this information, the High Court observed:[86]

> Whether the Rūnanga's claims in this regard are valid and are to be recognised in New Zealand law are issues of major political and legal significance. It would be unnecessarily burdensome on the other parties involved in these proceedings for issues as to that to have to be resolved in proceedings which essentially involve the way ECan categorised the rights it was dealing with and the process by which those rights came to be transferred.

Restrictions on Relief

90. AWA's original claim in the High Court, brought under the Judicial Review Procedure Act 2016,[87] did not identify or allege any failure by the Council in relation to cultural effects. Rūnanga of course did not judicially review the decision and joined the proceedings later as an intervener.

91. The Appellant submits that if the Court were to find an error in the manner in which the Council considered cultural effects, then it would be inequitable to grant any relief to Rūnanga, as their claim is one which was not originally included within AWA's original pleadings.[88]

Conclusion

92. The Court of Appeal was correct in finding that water bottling is a "use" of water able to be granted consent under s14.

93. The Court of Appeal was however incorrect to allow the First Respondent's appeal, and set aside the decisions of the Canterbury Regional Council relating to the grant of the Use Permits.

94. The High Court was correct when it found that ECan did not make an error when it processed the consents in regards to cultural and/or end use effects of water bottling.

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[85] At [36] [[101.0102]].
[86] At [37] [[101.0103]].
[87] AWA's Amended Statement of Claim, dated 07 March 2019 [[101.0032].
[88] Above n 2, at [292] [[101.0178]].

95. The Appellant therefore seeks that its appeal be allowed, and the decision of the High Court reinstated.

We certify that the Appellant's submissions are suitable for publication and do not contain any information that is suppressed.

A C Limmer Counsel for the Appellant	S A Chidgey Solicitor for the Appellant

List of Authorities

Legislation

1 Resource Management Act 1991

2 The Litter Act 1979

Cases

3 *Aotearoa Water Action Inc v Canterbury Regional Council* [2018] NZHC 3240, (2018) 20 ELRNZ 793.

4 *Aotearoa Water Action Inc v Canterbury Regional Council* [2019] NZHC 3187, [2020] 2 NZLR 359.

5 *Aotearoa Water Action Inc v Canterbury Regional Council* [2020] NZHC 1625, (2020) 21 ELRNZ 911.

6 *Aotearoa Water Action Inc v Canterbury Regional Council* [2022] NZCA 325, (2022) 24 ELRNZ 30.

7 *Bay of Plenty Regional Council v Fonterra Co-Operative Group Limited* [2011] NZEnvC 73, (2011) 16 ELRNZ 338.

8 *Central Plains Water Trust v Ngai Tahu Properties Ltd* [2008] NZCA 71, (2008) 14 ELRNZ 61.

9 *Colley v Auckland Council* [2021] NZHC 2365.

10 *Ennor v Auckland Council* [2018] NZHC 2598.

11 *Infinity Group Holdings v Canterbury Regional Council* [2017] NZEnvC 35.

12 *Laidlaw College Inc v Auckland Council* [2011] NZEnvC 248.

13 *Marlborough District Council v Zindia Ltd* [2019] NZHC 2765, (2019) 21 ELRNZ 364.

14 *P & E Ltd v Canterbury Regional Council* [2015] NZEnvC 106.

15 *Smith v Marlborough District Council* ENC Wellington W098/06, 9 November 2006.

16 *Te Rūnanga o Ngāti Awa v Bay of Plenty Regional Council* [2020] NZHC 3388, (2020) 22 ELRNZ 323.

17 *Te Rūnanga o Ngāti Awa v Bay of Plenty Regional Council* [2022] NZCA 598.

18 *Tussock Rise Limited v Queenstown Lakes District Council* [2019] NZEnvC 111.

19 *West Coast ENT Inc v Buller Coal Ltd* [2013] NZSC 87, [2014] 1 NZLR 32.

Legislative material

20 Operative Canterbury Land & Water Regional Plan.